

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Promoting Efficient Use of Spectrum
Through Elimination of Barriers to the
Development of Secondary Markets**

WT Docket No. 00-230

To: The Commission

Reply Comments of the Rural Telecommunications Group

The Rural Telecommunications Group ("RTG"),¹ by its attorneys, respectfully submits these reply comments in response to the Federal Communications Commission's ("Commission" or "FCC") proposal to permit radio spectrum licensees to lease or rent their spectrum usage rights to unaffiliated entities.²

The Commission's *Secondary Market Proposal* has achieved a rare distinction. While many of the 36 commenting parties offer constructive criticism and advice, the parties unanimously support the core concept of leasing spectrum usage rights. As the

¹ RTG is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service, Personal Communications Services ("PCS"), and Multichannel Multipoint Distribution Service ("MMDS") to their subscribers. Many of RTG's members also hold Local Multipoint Distribution Service ("LMDS") licenses and have started to use LMDS to introduce advanced telecommunications services and competition in the local exchange and video distribution markets in rural areas. Other RTG members seek to acquire spectrum or to be able to utilize the spectrum of others. They have found it difficult to acquire spectrum through auctions or to structure management or lease arrangements due to FCC rules, policies and case precedent. RTG's members are all affiliated with rural telephone companies.

² *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking in WT Docket No. 00-230, FCC 00-402 (released November 27, 2000), 65 Fed. Reg. 81475 (December 26, 2000). ("Secondary Markets Proposal"). The Commission directed that reply comments be filed not later than 30 days after February 9, 2001.

Commission is all too aware, it is extraordinary when so many parties are able to agree on the core of any Commission initiative. The Commission should therefore move as quickly as possible to adopt final rules that permit spectrum leasing.³

As set forth in its initial comments, RTG believes that it is crucial for the Commission to establish the proper incentives for licensees to voluntarily lease their unused spectrum. If the Commission puts these incentives in place, a secondary market in spectrum will flourish. If the incentive structure is wrong, there is nothing the Commission can do, apart from mandating the leasing of unused spectrum, that will jumpstart a secondary market.

Licensees and lessees must understand their respective rights and obligations. The Commission must explicitly identify what is entailed in a “spectrum usage right.” Even more importantly, the Commission must establish the bedrock obligations of the parties for compliance with the Communications Act of 1934, as amended, other applicable laws and Commission regulations.

RTG continues to believe that licensees will not lease portions of their spectrum usage rights if they are strictly liable for the actions of independent lessees. The incremental revenue that a licensee will garner from leasing will be more than offset by the threat of forfeitures, non-renewals and revocations on unsuspecting licensees for the transgressions of lessees. The comments support RTG’s view that the Commission must impose compliance obligations on the actual spectrum user. Even those parties not in full agreement with RTG believe that the parties to a lease can share responsibility for

³ RTG agrees with Sprint and others that adopting wide reaching leasing authority for licensees is too important to wait until the Commission has resolved all of the ramifications that accompany the creation of a secondary market. Rather than wait for resolution of all matters, the Commission can adopt its core leasing proposal now and work toward resolution of the remaining issues through further proceedings. *See* Sprint Corp. Comments at 4.

compliance or establish responsibilities for compliance under the terms of their leases. No Commentor disputes the Commission's legal authority to enforce the law and its rules against "any user" of the radio spectrum. Moreover, the Commission has received many valuable suggestions as to how it might administer an enforcement regime targeted at the actual user of spectrum—whether it be the licensee, lessee or sub-lessee.

The Commission should adopt some version of RTG's "functional approach" to leasing that ensures that it is aware of the identity of all users of spectrum in otherwise licensed bands. This approach requires licensees to complete an initial due diligence but then frees them of responsibility for the transgressions of lessees of which they could not possibly be aware. This approach to spectrum leasing overcomes the major hurdle to secondary market transactions while still requiring licensees to exercise some control over their lessees.

I. INTRODUCTION

The Rural Telecommunications Group is a most enthusiastic supporter of the Commission's spectrum leasing proposal. RTG members know too well that the primary market for radio spectrum is all but foreclosed to entities that wish to serve rural communities, other underserved areas and small geographic license areas.⁴ The difficulties of success in the primary spectrum market are not yet offset by a vibrant secondary market. To date, licensees holding large area licenses have been hesitant to permanently partition or disaggregate their licenses to smaller entities. As a result, large swaths of spectrum in various bands are not in use in many areas of the United States. The U.S consumer ultimately suffers from this inefficient use of a limited resource.

⁴ See RTG Comments at 3-10.

The Commission's *Secondary Markets Proposal*, if adopted, has the potential of alleviating the yawning "disconnect" between spectrum licensees and spectrum entrepreneurs. In its comments, RTG suggested several modifications and clarifications to the Commission's proposals that should incent these parties to voluntarily enter into private leases that promote the public interest. These include the following:

- The Commission must clearly and carefully delineate what it means by a "lease" and a "spectrum usage right."
- The Commission should extend leasing rights to as many radio services as possible;
- The Commission should be available to resolve spectrum-related disputes between lessors and lessees;
- Lessees should be responsible for resolving frequency interference matters and complying with operating rules;
- Lessees should be allowed to submit documents directly to the Commission with the knowledge of the licensee;
- The Commission should allow licensees and lessees to enter into long term leases that extend beyond the license term or allow leasing parties to create contingent rights;
- The Commission should apply its "qualification, service and use" rules directly upon long term lessees, except that build out and substantial service requirements should apply to licensees;
- The Commission should focus its compliance and enforcement regime on the day-to-day user of the spectrum, whether that be the licensee, lessee or sublessee;
- The Commission should limit a licensee's due diligence obligations to ensuring that lessees are qualified to use the spectrum and aware of their obligations;
- The Commission should replace the existing *Intermountain Microwave*⁵ test for determining *de facto* control with a functional test that requires licensees to ensure that the Commission is aware of the entity utilizing spectrum and that the leasing entity has submitted to Commission oversight.

⁵ *Intermountain Microwave*, 12 FCC 2d 559, 24 RR 983 (1963).

RTG urges the Commission to fashion its leasing program as closely as possible to the general commercial practices in place in the business world. To the extent potential parties to a lease can rely upon the core rights and responsibilities that under gird the leasing of other types of property interests in the business world, the more likely it is that voluntary spectrum leasing will accomplish the Commission's public interest goals.

II. THE COMMISSION SHOULD TARGET ITS COMPLIANCE AND ENFORCEMENT EFFORTS ON THE DAY-TO-DAY USERS OF SPECTRUM

RTG continues to believe that the most important decision the Commission will make in this proceeding is establishing the relative rights and responsibilities of spectrum licensees (lessors) and spectrum lessees (as well as sublessors and sublessees). While RTG recognizes that the implications of "control" of a government-authorized spectrum usage right can complicate this leasing regime, the Commission should strive to mirror the distribution of leasing rights and responsibilities established for other economic goods.

A lessor of other types of property certainly does not transfer permanent control of that property through a lease. Rather, a lease is a transfer of temporary possession and use. With that transfer, the lessor expects that the lessee will be responsible for the proper use of the property in accordance with prevailing law. The parties to a lease often divide between them responsibility for the duties and obligations that come with the property and expect that governments will respect and uphold that division. Most importantly, the lessor expects that government authorities will not hold it responsible for

the criminal or tortuous use of its property by lessees or sublessees of which it was unaware or played no role in committing.

Without these fundamental expectations, RTG submits that the near ubiquitous commercial leasing that we experience today in the United States would not exist. The Commission can do much to replicate the climate that promotes commercial leasing in the U.S. by directing its enforcement actions at those entities that utilize spectrum in violation of law or rules. At the same time, the Commission has every right to expect licensees to assist it in enforcing its rules and terminating harmful actions of spectrum users in privity of contract with a given licensee.

A. The Comments Overwhelmingly Support RTG's View That Lessees Must be Held Accountable for Compliance with Rules and Law

The comments support RTG's view that under a voluntary spectrum leasing regime licensees cannot be held strictly liable for the actions of independent third party lessees. Even those Commentors who argue for licensee accountability for the acts of their lessees suggest that the Commission should permit and recognize any division of responsibilities established under the lease. The Commission should either impose its rules against the actual user of the spectrum usage right or accept the apportionment of compliance obligations adopted by the leasing parties pursuant to private negotiations.⁶

The majority of Commentors support RTG's alternative approach to compliance.⁷

There is a clear consensus among both large and small spectrum holders and potential

⁶ RTG agrees with WinStar Communications, among others, that the Commission may realistically seek to hold licensees accountable for lessee actions under short-term leases. *See* WinStar Comments at 6. Lessees under short-term leases often have far less responsibilities for compliance with ongoing governmental obligations. Moreover, the leasing parties can insure against damage caused by the lessee.

⁷ Among the parties commenting on this matter, RTG, Blooston, Markofsky's eight (8) rural carriers, CTIA, Cingular Wireless, Cook Inlet Region, El Paso Global Networks, Hypres, NTCA, Rural Cellular Association, Teligent, Vanu, UTStarcom, and WinStar support some version of lessee responsibility.

lessees that the Commission's proposed enforcement focus on licensees will undermine its auction goals. The Cellular Telecommunications and Internet Association (CTIA) argues that the Commission's approach is not feasible and "would discourage parties from entering into spectrum leases, the exact result the *Notice* seeks to promote...While a licensee would expect generally to be able to rely on a lessee to comply with the rules, the possibility of being held to a strict liability standard for the actions of the lessee, which could result in sanctions such as forfeitures and even license revocation, would discourage spectrum leases."⁸ CTIA goes on to explain that the Commission should not expect licensees to serve as enforcement agents of the Commission through the exercise of contractual terms that require lessee compliance, as this would cause significant delay as "rule violation" disputes wind their way through the courts.⁹ Instead, the Commission should hold the party actually operating the spectrum responsible for immediate compliance.¹⁰ Cingular explains that "licensees will be reluctant to lease spectrum if bad acts by lessees could cause harm at renewal."¹¹ WinStar Communications argues that lessees operating radio facilities under long-term leases should be responsible for their own actions. To make licensees "ultimately responsible" for lessee's behavior will diminish the incentive to enter into such leases as licensees are forced to weigh the regulatory risks of leasing (including potential loss of licenses) versus the commercial benefit.¹² Instead, Winstar urges the Commission to hold licensees to a lesser standard of care. If a licensee knew or should have known of a lessee's intention to violate the rules or had actual knowledge of bad acts and did not try to prevent them or

⁸ CTIA Comments at 9.

⁹ *Id.* at 9-10.

¹⁰ *Id.* at 11.

¹¹ Cingular Comments at 7.

¹² WinStar Communications Comments at 6-7.

report the lessee to the Commission, the Commission could find that the licensee had abdicated its responsibilities.¹³ Teligent, while recognizing that a licensee may be ultimately responsible for actions taken pursuant to a license, urges the Commission to take action directly against the lessee as a telecommunications service provider or third party beneficiary to the lease. Teligent notes that this direct approach is far more effective than having a licensee attempting to stop a potential rules violation under the terms of its contract.¹⁴

The National Telephone Cooperative Association (NTCA) argues that the Commission should permit the parties to privately negotiate for compliance responsibilities or “large companies that are license holders will not lease their fallow spectrum to smaller entities. The FCC’s approach to compliance would create a new barrier to leasing that would neither facilitate leasing nor increase the opportunities for small businesses and rural telephone companies to participate...License holders should not be held accountable for the acts of lessees if the Commission seriously seeks to develop an active and robust secondary market.”¹⁵ The Rural Cellular Association explains that the Commission’s approach will place an extensive administrative burden on both parties that will need to be reflected in complex and expensive lease provisions.¹⁶ The law firm of Blooston, Mordkofsky, Dickens, Duff, and Prendergast, on behalf of several small rural carriers, explains that large licensees will be reluctant to lease to rural carriers if by doing so they expose themselves to FCC enforcement actions. Instead, the firm suggests that licensees be only secondarily liable for their lessees’ actions and that

¹³ *Id.* at 11.

¹⁴ Teligent Comments at 7.

¹⁵ NTCA Comments at 4-5.

¹⁶ RCA Comments at 6.

this responsibility be fulfilled by ensuring that lessees are aware of their regulatory obligations.¹⁷

Cook Inlet Region explains that it is more appropriate to regulate the actual user of the spectrum resource and that to burden the licensee with compliance “may stymie the growth and development of a robust secondary market.” While Cook Inlet Region suggests a procedure that would provide licensees with notice of lessee violations and an opportunity to cure, it concludes that licensees might be unwilling to risk the loss of their licenses due to others’ actions that go on without the licensee’s knowledge.¹⁸ El Paso Global Networks Company agrees with Cook Inlet Region that, at a minimum, licensees must be given knowledge of a lessee’s non-compliance and an opportunity to cure. It concludes, however, “the Commission would be undermining the operation of the market it seeks to create if it enforces its rules in such a way as to afford [spectrum] users the rights but not the responsibilities inherent in the use of leased spectrum or spectrum rights.”¹⁹

Other Commentors support RTG as well. HYPRES Technology states that participants in a leasing arrangement should have responsibility for compliance “with respect to the operating parameters over which they have influence.”²⁰ Vanu, Inc. believes that the Commission should be able to proceed with enforcement actions directly against lessees and that the parties should be able to contractually allocate the

¹⁷ Blooston, Mordkofsky Dickens, Duffy, and Prendergast Comments at 6-7. (Comments filed on behalf of: Golden West Telecommunications Cooperatives, Inc.; Kerrville Telephone Company; Lincoln County Telephone Systems, Inc.; Penasco Valley Telephone Cooperative; Souris River Telecommunications Cooperative; Sully Buttes Telephone Cooperative; Townes Telecommunications; and Valley Telecommunications Cooperative Association.)

¹⁸ Cook Inlet Region Comments at 5-6.

¹⁹ El Paso Global Networks Company Comments at 5-7.

²⁰ HYPRES Technology Comments at 6.

consequences of rule non-compliance.²¹ UTStarcom, Inc. notes that imposing responsibility on a licensee will tip the balance against leasing for small-scale low dollar leases. Instead, the Commission should permit [and recognize] delegations of compliance obligations between the leasing parties.²²

Even the Commentors who do not outright support the need to place compliance obligations solely on lessees recognize the need for flexibility. AT&T Wireless Services, for example, while suggesting that licensees will not be deterred from leasing if they remain responsible for the actions of lessees, urges the Commission to permit licensees and lessees to divide responsibility for Commission requirements through private negotiations.²³ Entergy Corporation, Cinergy Corp. and Kansas City Power & Light Company agree that the licensee should be held ultimately responsible for actions of lessees, but explain that all parties “using or leasing should be equally responsible for compliance and subject to penalties...”²⁴ Nextel Communications, Inc. too believes that a licensee must have ultimate responsibility, but supports the use of private contracts that establish the compliance obligations of lessees.²⁵

The American Mobile Telecommunications Association (AMTA) favors licensee responsibility, yet it calls on the Commission to rely upon the contractual relationship of the parties to determine how this requirement would work in practice.²⁶ The Office of Advocacy of the Small Business Administration urges the Commission to pursue means

²¹ Vanu, Inc. Comments at 10.

²² UTStarcom, Inc. Comments at 3.

²³ AT&T Wireless Services Comments at 9-10.

²⁴ Kansas City Power & Light Company Comments at 6; Cinergy Corp. Comments at 5; Entergy Corporation Comments at 5.

²⁵ Nextel Communications Comments at 13-14.

²⁶ AMTA Comments at 4.

of holding lessees responsible for compliance that may include contract terms in leases.²⁷ Securicor Wireless Holdings, Inc. suggests that the Commission should have the option of enforcing sanctions directly against the lessee, while maintaining ultimate responsibility against the licensee.²⁸ The Software Defined Radio (SDR) Forum notes that the licensee’s responsibility should not relieve the lessee of responsibility for compliance as well.²⁹

As a matter of policy, then, the Commentors support an approach that would have the Commission enforce its technical and operational requirements directly against the day-to-day user of the spectrum usage right. Even the majority of those Commentors who suggest otherwise urge the Commission to support the private delineation of compliance obligations negotiated by the parties to a lease, or, to impose certain obligations directly against the lessee.

B. The Commission Has the Legal Authority to Enforce Technical, Operational, and Service Requirements Against Non-Licensees

As a matter of law, the Commission has the authority to enforce the requirements of the Communications Act of 1934, as amended, its rules and policies against any user of the spectrum. Notably, even the Commentors who do not support this approach do not argue that the Commission lacks such authority. Moreover, several Commentors concur with RTG’s legal analysis.

In its comments, RTG noted that Section 2 of the Communications Act casts an expansive jurisdictional net over “all persons” engaged in communications by radio.

²⁷ Office of Advocacy, Small Business Administration Comments at 1-2.

²⁸ Securicor Wireless Holdings Comments at 10.

²⁹ Software Defined Radio Forum Comments at 4-5.

Section 307 of the Communications Act requires compliance with rules even by persons operating without individual licenses. The Commission has exercised Section 205 of the Communications Act to impact non-regulated entities and has recognized that it could bring these otherwise unregulated entities into enforcement actions in accordance with Section 411 of the Act. Sections 501, 502 and 503 of the Act contemplate enforcement of the Commission’s rules against any person. Finally, RTG pointed out that an approach that would impose “ultimate responsibility” on licensees for the acts of independent third parties would replace the “willful and knowing” requirement for violations articulated by Section 312(f)(1) of the Communications Act with a strict liability standard, something the Commission cannot do without a change in the statute.³⁰

Several other Commentors point out the clear authority of the FCC to enforce its requirements against non-licensees as well. CTIA also identifies to Section 2(a) of the Act as a source of jurisdiction over “all persons engaged” in radio communications and points out that this provision makes compliance actions against unknowing licensees both impractical and unnecessary.³¹ Cingular notes that Section 503 of the Act allows the Commission to impose forfeitures against lessees and to enjoin their actions in accordance with Sections 312 and 401.³² Winstar explains that in accordance with Section 2 of the Act, “the FCC’s jurisdiction over lessees engaging in the transmission of radio signals is clear.” Winstar also explains that the Commission’s proposed revision of its *Intermountain Microwave* standard for assessing control in the leasing context unnecessarily attempts to impose derivative compliance obligations on lessees through

³⁰ RTG Comments at 16-19.

³¹ CTIA Comments at 10, 14.

³² Cingular Wireless Comments at 6.

their contract obligations as the Commission has direct jurisdiction over lessees under Section 2 of the Communications Act.³³

C. The Commission Can Fashion an Efficient Administrative System for Determining Which Entity Controls Day-to-Day Operations Under A Revised *Intermountain Microwave* Standard

All parties agree that the Commission must abandon its current test for determining whether an entity has *de facto* control of a radio license in the context of leasing. The *Intermountain Microwave* criteria are entirely inconsistent with the typical leasing scenario, where the lessee does have day-to-day responsibility over the use of the leased good. Nevertheless, as RTG and others explain, a lease, in everyday parlance, does not constitute a transfer of control that implicates Section 310(d) of the Communications Act of 1934.³⁴

The Commission can and should modify its approach to Section 310(d) in the leasing context by requiring that the licensee provide it with sufficient information on lessees, advise lessees of their responsibilities, maintain the right to rescind licenses for violations; and assist the Commission when compliance problems are brought to the licensee's attention. The Commission need not, however, conclude that it must punish licensees for the acts of lessees in order to find that a licensee "controls" the spectrum usage right.³⁵

The Commission should not reject this preferable approach to compliance, enforcement and licensee control simply on the grounds that it is administratively

³³ Winstar Comments at 7, 11.

³⁴ CTIA Comments at 13-14.

³⁵ Pacific Wireless Technologies at 4. Nextel Communications at 12-14.

unworkable. It is not. While this approach may require additional resources and modifications to existing data bases, any incremental costs to the FCC will be more than offset by the significant economic activity generated by leasing and the resulting spectrum efficiencies. Moreover, RTG and others have provided the Commission with realistic approaches for minimizing its additional workload.³⁶

RTG urged the Commission to adopt a “functional” approach to evaluating licensee control of and responsibility for the actions of lessees. This approach imposes strict preliminary due diligence obligations on licensees and then imposes ongoing compliance obligations on lessees (and sublessees) as the beneficial users of the spectrum.³⁷

Other Commentors as well provided the Commission with guidance for administering this approach to spectrum user oversight. AT&T recommends that the licensee should obtain a certification of compliance with the FCC rules from each lessee or sublessee.³⁸ Blooston Mordkofsky suggests that licensees should have to include express covenants in their lease agreements with the lessee.³⁹ CTIA and Winstar

³⁶ If the Commission ultimately concludes that the parties to a lease must file notifications with the Commission that identify the spectrum user, RTG would not oppose creation of a cost-based filing fee adopted in accordance with Section 8 of the Communications Act to compensate the Commission for the administrative costs of these filings.

³⁷ The Commission should not find a *de facto* transfer of control has occurred if: (a) a licensee follows the Commission’s checklist for determining the initial eligibility of a lessee to qualify for the use of spectrum; (b) a licensee informs each lessee of a lessee’s service, technical and operational obligations within the body of a lease; (c) a licensee requires that the lessee acknowledge and submit to Commission jurisdiction through a certification by the lessee in the lease that it will comply with Commission rules, policy, and laws and that it recognizes the authority of the Commission or licensee to cancel a lease for failure to comply; (d) a licensee requires that all lease terms be committed to writing; (e) a licensee retains a record of all leases, FCC filings and coordination/interference agreements reached by its lessees; (f) a licensee makes these records available to the Commission upon request; (g) for each lease, a licensee submits identifying information to the Commission that allows the Commission to identify and contact each lessee; and (h) a licensee commits to assist the Commission in identifying non-complying lessees and to take all reasonable steps to halt non-compliance brought to its attention.

³⁸ See AT&T Comments at 13.

³⁹ See Blooston Mordkofsky Comments at 6.

Communications suggest that the licensee submit contact information for the entity actually operating the spectrum, the lessee, and hold that entity accountable for rule violations.⁴⁰ Cinergy, Entergy and Kansas City Power and Light all recommend the FCC provide public notice of leased operations through the use of a database on the Wireless Telecommunications Bureau's website.⁴¹ Cingular Wireless and Securicor Wireless Holdings propose the Commission establish a "safe harbor" specifying factors that need to be included in a compliance program.⁴² Securicor adds that licensees should also be required to follow the Commission's due diligence requirements. Cook Inlet advises the FCC to adopt a post-lease notice application to be signed and filed by the licensee and lessee within a short time of execution of a lease.⁴³ Enron Corporation recommends that both the licensee and the lessee file compliance assurances with the FCC.⁴⁴ It could then give notice of any revocation proceedings to any spectrum user that has registered with the Commission for rule violations. At a minimum, the lessee should be required to file informational reports with the FCC. NTCA suggests the Commission compile a database of contact information of all lessees.⁴⁵ If the Commission should find any lessee violates the rules, they should be given reasonable time to cure. If the lessee fails to cure, the FCC can proceed directly against the lessee. The Office of Advocacy of the U.S. Small Business Administration proposes the FCC require due diligence by the licensee and contractual obligations on the lessee to comply with Commission rules.⁴⁶ Pacific Wireless Technologies advises the FCC to request certifications from the lessee,

⁴⁰ CTIA Comments at 11-15. Winstar Comments at 8.

⁴¹ Cinergy Comments at 4-5. Entergy Comments at 4-5. Kansas City Power & Light Comments at 5.

⁴² Cingular Wireless Comments at 5-6. Securicor Wireless Holdings at 9.

⁴³ Cook Inlet Comments at 4-5.

⁴⁴ Enron Comments at 19.

⁴⁵ NTCA Comments at 5-6.

⁴⁶ Office of Advocacy of the U.S. Small Business Administration Comments at 2.

eliminating the need for onerous due diligence requirements.⁴⁷ Teligent concurs with the Commission's proposals but recommends that licensees certify that each lessee or sublessee has certified to meeting all the applicable eligibility requirements and the lessee will comply with all the technical and services rules.⁴⁸ Vanu, Inc. recommends the Commission adopt rules obligating the lessee to comply with all applicable rules and allowing the FCC and licensee to conduct investigations.⁴⁹

The Commission can fashion an administrative mechanism for tracking actual spectrum usage based upon these suggestions. This mechanism should allow the Commission, licensees, lessees and the public to determine exactly what entity is operating on a given frequency in a given geographic area and provide enough information to contact that particular spectrum user.

III. THE COMMISSION SHOULD APPLY SERVICE, ELIGIBILITY, OPERATIONAL AND TECHNICAL REQUIREMENTS INDEPENDENTLY TO SPECTRUM LESSEES

Like other Commentors, RTG supports measured efforts to eliminate regulatory burdens on wireless operators. This should be an ongoing effort in accordance with Sections 10 and 11 of the Communications Act as the Commission responds to changing competitive and technological trends in the wireless sectors. Moreover, no one can seriously question that increasing flexibility in technical and service rules will improve the environment for secondary market transactions. While RTG might not go as far as the 37 Concerned Economists who call for the elimination of eligibility requirements,

⁴⁷ Pacific Wireless Technologies Comments at 6.

⁴⁸ Teligent Comments at 5-8.

⁴⁹ Vanu, Inc. Comments at 11.

service requirements, technology requirements and implementation requirements,⁵⁰ it does believe that the Commission should continue to review the need for any of its regulations. RTG agrees with Sprint Corporation that the 37 Economists' calls for fundamental reforms should be carefully considered by the Commission, but should not delay adoption of the spectrum leasing rights needed today.⁵¹

RTG does not believe, however, that a vibrant secondary market requires that lessees be allowed to escape the requirements and standards that the Commission has in place at any given time. If the Commission were to determine that lessees need not comply with requirements otherwise imposed upon licensees operating in the same band subject to the same regulatory status, leasing would become a tool for undermining the Commission's public interest determinations. As RTG noted in its comments, if a lessee could strip off the regulatory obligations that accompany the spectrum usage right (other than core interference protection requirements), the Commission would likely experience many instances of licensees leasing spectrum to co-owned or affiliated entities.⁵² Leasing should not be used as a tool of regulatory avoidance nor should the Commission inadvertently promote such uses.

RTG disagrees, then, with several parties who urge the Commission not to require lessees to comply with the obligations that run with the license.⁵³ The Commission cannot ignore, however, some of the regulatory conundrums that would arise under a leasing regime. RTG agrees with CTIA, for example, that the Commission cannot "double count" spectrum for the purpose of calculating spectrum cap limits by attributing

⁵⁰ Comments of 37 Concerned Economists at 5-6.

⁵¹ Sprint Corporation Comments at 3.

⁵² RTG Comments at 29, footnote 53.

⁵³ See, e.g., AT&T Comments at 4-8; Cingular Wireless Comments at 8.

spectrum to both the licensee and lessee.⁵⁴ Cingular is correct to note that the Commission should somehow deal with obligations such as E-911, CALEA, number portability, CPNI, Truth-in-Billing and universal service in the context of leasing.⁵⁵ The answer to these issues though is not that leased spectrum is stripped of these requirements, but that the parties must apportion these requirements (and the regulatory costs) within the terms of the lease or the Commission itself must apportion them. The focus of regulation should be on the actual spectrum user and obligations that run with this usage.

In this vein, several parties comment on whether and how a Designated Entity (DE) licensee who used auction incentives to garner spectrum may lease this spectrum to non-designated entities.⁵⁶ RTG agrees that DE licensees in all radio services should have the flexibility to participate in spectrum leasing. However, consistent with its position above, RTG suggests that the Commission cannot simply ignore that a DE licensee could immediately pass on its auction benefits to an unqualified party through a long-term lease.

RTG believes that Cook Inlet Regions' approach achieves both of these competing policy goals. The Commission should not prohibit outright the leasing of spectrum from a DE licensee to a non-DE licensee. It should, however, require that the DE licensee make an unjust enrichment payment to the Commission as a condition of the lease. The unjust enrichment payment would be prorated in accordance with the percentage of spectrum, geographic territory and duration included in the leased spectrum

⁵⁴ CTIA Comments at 7-8.

⁵⁵ Cingular Wireless Comments at 8-9.

⁵⁶ *See, e.g.*, Alaska Native Wireless Comments at 3; AT&T Wireless Services Comments at 8-9; NTCA Comments at 6-8; Blooston, Mordkofsky, Dickens, Duffy And Prendergast Comments at 5-6; Cook Inlet Region Comments at 7-9, 11-13; SBA Office of Advocacy Comments at 2-4.

usage right that was purchased through government incentives.⁵⁷ The leasing parties can of course negotiate to reflect the unjust enrichment payment in the terms of their leases and, in all likelihood, the non-DE lessee will pay for access to the DE's spectrum through an upfront premium that reflects this payment.

This compromise approach is consistent with the fact that a DE licensee is not transferring permanent control of a license through a lease. The DE is, however, transferring the right to receive economic value from the spectrum usage right. The U.S. public should not be required to subsidize a non-DE's use of this resource for its private economic benefit. At the same time, this approach will not foreclose DE to non-DE leasing when it makes economic sense without the benefit of the government subsidy.⁵⁸

IV. CONCLUSION

RTG commends the Commission for considering this fundamental reform to its spectrum management policies. The Commission's *Secondary Markets Proposal* will hopefully lead to final rules that allow for more efficient use of our limited spectrum resources and allow rural telephone companies and other small entities to put spectrum to use in their home communities.

RTG believes that the most important decision the Commission will make here is the proper apportioning of rights and responsibilities between lessors and lessees. If done correctly, licensees will voluntarily lease spectrum because they determine it is in

⁵⁷ See *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rulemaking 15 FCC Rcd 10456 (May 2000).

⁵⁸ Theoretically, repayment of the DE's auction bidding benefits merely removes the government subsidy and places the DE spectrum on equivalent terms with other licensed spectrum that may be available in that community.

their economic interest to do so. Their economic calculations should not include unnecessary compliance and enforcement contingencies that should apply directly to the actual user of the spectrum usage right. RTG believes that a vibrant secondary market will naturally bloom with these incentives in place.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Fatmata B. Deen, an employee with the law firm of Bennet & Bennet, PLLC, hereby certify that on March 12, 2001 copies of the forgoing "Reply Comments of the Rural Telecommunications Group" were mailed via first-class or hand delivered unless otherwise indicated.

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